



UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE

United States Patent and Trademark Office

Address: COMMISSIONER FOR PATENTS

P.O. Box 1450

Alexandria, Virginia 22313-1450

www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/705,273	11/10/2003	Brian J. Brown	S63.2N-6769-US03	4909
490 7590 10/03/2008 VIDAS, ARRETT & STEINKRAUS, P.A. SUITE 400, 6640 SHADY OAK ROAD EDEN PRAIRIE, MN 55344				
EXAMINER				
BUL VY Q				
ART UNIT		PAPER NUMBER		
3773				
MAIL DATE		DELIVERY MODE		
10/03/2008		PAPER		

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.



UNITED STATES PATENT AND TRADEMARK OFFICE

Commissioner for Patents
United States Patent and Trademark Office
P.O. Box 1450
Alexandria, VA 22313-1450
www.uspto.gov

**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 10/705,273
Filing Date: November 10, 2003
Appellant(s): BROWN ET AL.

James L. Shands
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed 7/10/2008 appealing from the Office action mailed 5/30/2008.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

Art Unit: 3773

(8) Evidence Relied Upon

6,190,403	Fischell et al	2-2001
5,810,872	Kanesaka et al.	9-1998

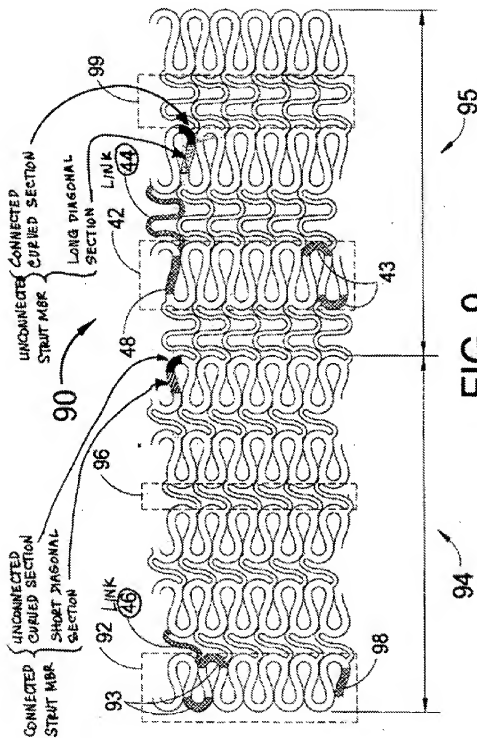
(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claim Rejections - 35 USC § 102

1. Claims 38, 42-43 and 45 are rejected under 35 U.S.C. 102(e) as being anticipated by Fischell et al-6,190,403.

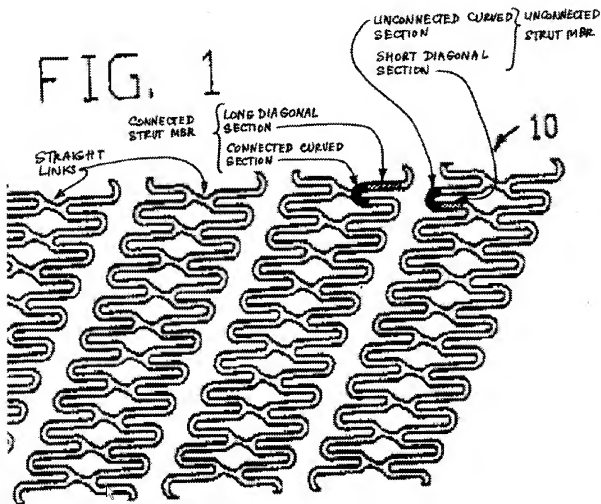
As to claims 38, 42-43 and 45, Fischell-'403 discloses a stent made of a stainless steel. Further, Fischell-'403's Fig. 9 reproduced below shows substantially all limitations of the claims:



Art Unit: 3773

2. Claims 38 and 39 are rejected under 35 U.S.C. 102(e) as being anticipated by Kanesaka et al-5,810,872.

As to claims 38 and 39, Kanesaka -'872 discloses a stent shown in Fig. 1 partially reproduced below with substantially all limitations of the claims:



Claim Rejections - 35 USC § 103

Claim 46 is rejected under 35 U.S.C. 103(a) as being unpatentable over Fischell et al.-6,190,403 in view of Anderson et al.-5,800,526.

As to claim 39, Fischell-'403 discloses every limitation of the claimed invention, except for a straight link. However, Anderson-'526 (col. 4, lines 37-40; col. 9, lines 52-61) discloses a stent of tantalum for easy detection under a fluoroscopy process. It would be obvious to one of ordinary skill in the art to make Fischell-'403 from a tantalum material for easy detection under a fluoroscopy process.

Response to the "Applicants' Arguments"

1. Rejection Of Claims 38, 42 - 43, And 45 Under 35 U.S.C. § 102(E) by Fischell:

Applicants (page 9, Appeal Brief) argue that "the Examiner must adopt the definitions, meanings, and/or usages of the terms in claim 38 **as those terms are used in the '775 patent**, as".

However, MPEP 2304.02(d) states that "An applicant is not entitled to an interference simply because applicant wants one. The interfering claim must be allowable, particularly with respect to the written description supporting the interfering claim.". The present application is not an interference case yet. More importantly, the interfering claim has been not allowed and in fact has been rejected as indicated above.

Further, 37 CFR 41.200 (b) § 41.200 states that:

- (a) A patent interference is a contested case subject to the procedures set forth in subpart D of this part.
- (b) A claim shall be given its broadest reasonable construction in light of the

specification of the application or patent in which it appears.

[Added, 69 FR 49959, Aug. 12, 2004, effective Sept. 13, 2004]

It is clear that the above Applicants' Argument is in error at least because:

1. this application, until now, has never been an interference case.
2. the claims as presented in this application have not been allowed.

2. Rejection Of Claims 38 And 39 Under 35 U.S.C. § 102(E) By Kanesaka:

Applicants (page 12, Appeal Brief) argue that "Based on the above-quoted language from Kanesaka, there is no "multiplicity of interior circumferential sets of strut members," as recited in claim 38, because there is only a single set of strut members rather than a multiplicity of sets of strut members. There is only a single set of strut members in Kanesaka because the stent 10 is made from a single strip 11 made up of two tortuous members 12, 13 which is wound to form a cylindrical shape. As such, Kanesaka does not teach or suggest all the elements of claim 38.".

The Examiner recognizes that the Kanesaka's stent is formed from a strip of material as shown in Fig. 2. However, after forming a stent in a "cylindrical structure" as shown in Fig. 1, Kanesaka's stent does show and teach "one end circumferential set of strut members at each of the two longitudinal ends of the stent" and "a multiplicity of interior circumferential sets of strut members" as recited in claim 38.

Art Unit: 3773

3. Rejection Of Claim 46 Under 35 U.S.C. § 103(A) As Being Unpatentable Over
Fischell In View Of Anderson:

Applicants (page 13, Appeal Brief) argue that “The purported combination of Fischell and Anderson fails to teach or suggest all the limitations of claim 46. As argued above, Fischell fails to teach or suggest all the elements of claim 38, from which claim 46 depends. The addition of any alleged disclosure in Anderson of tantalum, as in claim 46, does nothing to remedy the deficiencies of Fischell as set forth above. As such, claim 46 is non-obvious. Applicants request that the rejection be withdrawn.”.

However, because the rejection 102(e) base on Fischell-6,190,403 is proper as indicated above, the 103(a) rejection is also proper.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

/Vy Q. Bui/

Primary Examiner, Art Unit 3773

Conferees:

/(Jackie) Tan-Uyen T. Ho/

Supervisory Patent Examiner, Art Unit 3773

/Thomas Barrett/

TQUAS TC 3700